IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN AT JODHPUR

O R D E R

S.B.CRIMINAL MISC. PETITION NO. 1402/2007
(Udai Lal Vs. State of Rajasthan and Ors.)

Date of Order : 23/10/2007

PRESENT

HON'BLE MR. JUSTICE H.R.PANWAR

Mr. Sanjay Mathur for the petitioner.
Mr. Ashok Upadhyay, public prosecutor.
Mr. Mahesh Khyani for the respondents No. 2 and 3.

BY THE COURT:-

By the instant petition under Section 482 Cr.P.C., the petitioner has challenged the order dated 07.09.2007 passed by Judicial Magistrate, First Class, Railmagra, district Rajsamand (for short 'the trial court' hereinafter) in FIR No. 204/2007 P.S. Railmagra, district Rajsamand directing the Manager, Nari Niketan, Jaipur to hand over the custody of Boggi @ Ratani to her parents who are respondents No.2 and 3 herein.

The facts and circumstances giving rise to the instant criminal misc. petition are that the respondent No.3 Smt. Manju lodged a first information report being FIR No. 204/2007 P.S. Railmagra against Bherulal, Balu and petitioner Udailal alleging therein that her daughter Boggi @ Ratani went to school on

19.7.2007. She and her husband i.e. respondent No.2, went to agriculture field. In the evening when they returned from the agriculture field, they did not find their daughter at home. It was alleged that on being asked to one Pintu, he informed that the accused persons named in the FIR namely Bheru and Balu were seen along with their daughter on a motorcycle. It was alleged that her daughter is minor and she has been taken away by those persons. On this FIR, the police registered a crime report for the offences under Sections 363 and 366 IPC and ensued the investigation. During investigation Boggi @ Ratani made a statement before the police as well as before the Judicial Magistrate stating therein that she married to the petitioner Udailal 13 to 14 years ago by performing "Saptpadi". At the time of her marriage, her in-laws gifted certain jewelleries. However, her parents want to marry her with some other person by selling her to which she did not agree and therefore, she at her own went with her husband petitioner Udailal. In her statement, serious allegations have been levelled against her parents who are respondents No.2 and 3 herein including the allegation that her parents wish that she should for prostitution and therefore, in order to save herself from the clutches of her parents, she telephoned her husband Udailal petitioner herein through STD booth and thereafter on her telephone, her husband came and took her along with him. She went with her husband voluntarily

and living with her husband as his wife peacefully. Similar is the statement made before the police as also before the Tehsildar, Railmagra. A similar statement was also recorded by the Additional Chief Judicial Magistrate, Rajsamand on 20.8.2007 wherein also Boggi @ Ratani stated that she married to petitioner Udailal in the childhood as it was a child marriage and the sister of her husband Udailal married to her uncle. She stated that her parents do not want to send her with her husband and wanted to marry her with some other person, whereas she does not want to marry anyone else but want to live with her husband Udailal. She has also filed a criminal case under the provisions of Domestic Violence Act against the respondents No.2 and 3 who are her parent. In the proceedings under the Domestic Violence Act, the statement of her Grand-father Mohan and Grand-mother Narayani have been recorded by the Additional Chief Judicial Magistrate, Gangapur wherein also both the witnesses stated that their grand daughter i.e. Boggi @ Ratani married to petitioner Udailal about 14 to 15 years ago. She wanted to live with her husband but her parents respondents No. 2 and 3 wanted to give her in Nata and marry with someone else, whereas she does not want to go in Nata marriage and wants to live with her husband Udailal.

Learned counsel appearing for the respondents No.2 and 3 submits that the marriage of Boggi @ Ratani has not been

established as there is no documentary evidence.

I have considered the rival submissions made by the counsel for the parties.

In order to appreciate the contentions, I think it appropriate to refer some of the provisions of Hindu Marriage Act (for short 'the Act' hereinafter). Section 5 of the Act provides conditions for a Hindu Marriage which reads as under:-

"5. Conditions for a Hindu Marriage:- A marriage may be solemnized between any two Hindus, if the following conditions are fulfilled namely :-

(i)Neither party has a spouse living at the time of marriage.

(ii) At the time of the marriage, neither party-

(a) is incapable of giving a valid consent to it in consequence of unsoundness of mine; or

(b) though capable of giving a valid consent, has been suffering from mental disorder of such a kind or to such an extent as to be unfit for marriage and the procreation of children; or

(c) has been subject to recurrent attacks of insanity or epilepsy.

(iii) The bridegroom has completed the age of twenty-one years and the bride the age of eighteen years at the time of marriage;

(iv) the parties are not within the degrees of prohibited

relationship unless the custom or usage governing each of them permits of a marriage between the two;

(v) the parties are not sapindas of each other, unless the custom or usage governing each of them permits of a marriage between the two."

Section 11 of the Act provides that the marriage shall be null and void on a petition presented by either party, declaring the same a nullity by a decree if it contravenes any one of the conditions specified in clause (i), (iv) and (v) of Section 5.

Section 12 of the Act provides that any marriage solemnized before or after the commencement of this Act, shall be voidable and may be annulled by a decree of nullity on any of the grounds mentioned therein. Sub-Section (b) provides that the marriage is in contravention of the condition specified in clause (ii) of Section 5 shall be voidable.

Thus, the marriage of a girl below 15 years of age, in contravention of Section 5 (iii) of the Act is neither void under Section 11 nor voidable under Section 12. Unless, the marriage is declared invalid it cannot be said that it is void.

In the instant case, undisputedly the parties are Hindus and they are village rusting persons and it is common in the village area having a child marriage. The girl Boggi @ Ratani herself states that in her childhood she was married to the petitioner which finds corroboration from the statement of her

grand-father and grand-mother who have been examined as AW-2 and AW-3 on 17.9.2007 by Additional Chief Judicial Magistrate, Gangapur. Thus, in view of the statement of these witnesses, it cannot be said that Boggi @ Ratani did not marry to the present petitioner.

Learned counsel for the petitioner has relied on a decision of this Court in Santoshi Vs. State of Rajasthan and Anr. S.B.Cr. Misc. Petition No. 627/2004 decided on 23.8.2004 wherein considering the provisions of Section 5, 11 and 12 of the Hindu Marriage Act, this Court held that the marriage of a girl below 15 years of age, in contravention of Section 5 (iii) is neither void under Section 11 nor voidable under Section 12. Thus, it is evident that unless marriage is declared invalid it cannot be said that it is void and for the custody of such woman the husband is the natural guardian. The case relied on by learned counsel for the petitioner in Santoshi Vs. State of Rajasthan and Anr. (supra) is also on the similar facts.

In the instant case, though Boggi @ Ratani has stated in her statement before the Judicial Magistrate Courts as also before the police and Tehsildar that she is 18 years of age, even if in the school record her age has been shown less than 18 years, then also, it appears that she is fully matured and is of

understandable age. She has been produced from Nari Niketan before me in the Court today. I have inquired her desire, she stated that she is more than 18 years of age. She has married to petitioner Udailal and her parents wanted to sell her to some one else by marrying with some person other than her husband and therefore, she went voluntarily with her husband and had been living with him as his wife and are leading a peaceful marital life but for the case instituted by the respondent No.3 mother, she has been taken out from the custody of her husband Udailal petitioner herein and ultimately has been sent to Nari Niketan by the order of the trial court.

In my view, prima-facie there is evidence that she married to the petitioner Udailal and appears to be of the mature age and fully understands of her wellbeing as stated in her statement and wishes to go with her husband to lead a peaceful marital life. In this view of the matter, the trial court fell in error in directing the custody of Boggi @ Ratani to her parents respondents No.2 and 3 and therefore, the order impugned cannot sustain.

This Court in Santoshi Vs. State of Rajasthan and Anr. (supra) held that there is no provision under any law which empowers the Magistrate to pass an order of detention of a woman in Nari Niketan without her consent. She can be detained

for a brief period only during an inquiry as to the custody of the girl.

In this view of the matter, the petition deserves to succeed.

Consequently, the criminal misc. petition is allowed. The order impugned dated 7.9.2007 passed by the Judicial Magistrate, Railmagra, district Rajsamand is set aside so far as it relates to give custody of Boggi @ Ratani to respondents No.2 and 3. The Manager, Nari Niketan, Jaipur shall set Boggi @ Ratani at her liberty. She may move at her own will.

(H.R.PANWAR),J.

Rp

S.B.Cr. Misc. Stay Petition No. 792/07
In
S.B.Cr. Misc. Petition No. 1402/07

Date of Order : 23/10/2007

HON'BLE MR. JUSTICE H.R.PANWAR

Mr. Sanjay Mathur for the petitioner.
Mr. Ashok Upadhyay, P.P.
Mr. Mahesh Khyani for the respondents No. 2 and 3.

Since the criminal misc. petition itself has been allowed, the stay petition stands disposed of.

(H.R.PANWAR),J.

rp.